Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1349

LINDA K. SABATER,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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Kansas Statutes Annotated:

K.S.A. 65-4127 (a) A12

K.S.A. 65-4107 (b) (4) A12

K.S.A. 21-4501 (c) A13

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

LINDA K. SABATER,

Petitioner,

vs.

STATE OF KANSAS

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF KANSAS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Linda Sabater, the petitioner herein, respectfully prays that a writ of certiorari issue to review the opinions and judgments of the Supreme Court of the State of Kansas rendered in this proceeding on December 6, 1979.

OPINIONS BELOW

The decision of the Kansas Supreme Court

denying review of the opinion of the Court of Appeals of State of Kansas is unreported and is printed in Appendix A hereto, infra, page A1. The opinion of the Court of Appeals, which the Kansas Supreme Court declined to review on December 6, 1979, is reported at Kansas Court of Appeals 2d. Vol. Three, p. 692, 601 P.2d p. 11 (1979) and is printed in Appendix B hereto, infra, p. A2.

The Kansas Court of Appeals denying petitioner's motion for rehearing is unreported and is printed in Appendix C hereto, infra, p. A3.

The Journal Entry of Judgment of the trial court is printed in Appendix D hereto, infra, p. A4.

JURISDICTION

The judgment of the Supreme Court of Kansas (Appendix A, infra, p. A1) was entered on December 6, 1979. No motion or petition for a rehearing of the said decision of the Kansas Supreme Court

is permitted under the Appellate Rules of the Kansas Supreme Court. The jurisdiction of the Supreme Court is invoked under 28 USC 1257 (3)

QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibition against unreasonable searches and seizures proscribes the nonconsensual search of a purse and wallet where such search occurs: (a) without warrant and in the absence of exigent circumstances; (b) at the scene of the arrest but subsequent to the time the accused has been placed in custody; and (c) after the police have reduced the purse and wallet to their exclusive possession.

2. Whether a state statute prohibiting possession and sale of cocaine and classifying said drug as a narcotic violates the right to due process, equal protection, the right to privacy and freedom from cruel and unusual punishment and whether such statute as applied to petitioner is unconstitutional.

3. Whether the scope of the prohibition against prosecutorial vindicativeness may include the filing of a new and higher charge based on differenct facts from those for which a constitutional right was exercised.

4. Whether the right of due process is violated where (a) the trial court permits the prosecution to present evidence of a defendant's arrest on a prior charge but (b) excludes evidence of defendant's acquittal of said prior charge.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Question One of this Petition concerns the prohibition against unreasonables searches and seizures set forth in the Fourth Amendment of the Constitution of the United States. Said Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and

> no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Also involved in this case are the due process clause of the Fifth Amendment, the prohibition against cruel and unusual punishment of the Eighth Amendment, the right to privacy incorporated in the Ninth Amendment, the due process and equal protection clauses of the Fourteenth Amendment (said Amendments of the United States Constitution are set forth in Appendix E, hereto, infra, p.A10, and Kansas Annotated 65-4127 (a) and 21-4501 (c) which outlaw possession possession and sale of cocaine in Kansas and K.S.A. 65-4107 (b) (4) which classifies cocaine as an opiate. (See Appendix E hereto, infra, p. A11)

STATEMENT OF THE CASE

This is an action brought by petitioner to secure reversal of her conviction of 1978.

The Kansas Court of Appeals upheld the conviction on October 12, 1979. The Suprme Court of Kansas denied review on December 6, 1979.

On June 10, 1977 petitioner was arrested at her place of employment in Wichita,Kansas, on a charge of conspiracy to sell cocaine. Four law enforcement officers were present at the time of the arrest.

Following the arrest petitioner was permitted to secure her purse from her desk prior to accompanying law enforement officers to the police station. Petitioner was never handcuffed.

Petitioner left with the officers through the front door of her employer's offices. She was allowed to carry her purse with her. Once outside one of the officers ordered petitioner to surrender her purse. Petitioner obeyed the order and the officer proceeded to open and then to search the petitioner's purse in the presence of petitioner and the three other officers.

Inside the purse the officer discovered a wallet. Upon seaching the wallet on the scene the officer found a plastic drinking straw.The police laboratory on June 20, 1977 determined that the straw contained a residue of cocaine.

It was undisputed at the hearing upon petitioner's motion to suppress of April 28, 1978 that there were no exigent circumstances justifying the search of the purse and wallet. Moreover, it is clear that the search took place several minutes after the arrest and away from the immediate area of the arrest.

It was also undisputed that at the time of the search the officer had obtained exclusive custody and control of the purse and its contents.

The purse was not secured by a lock, or a snap, but was in a closed position prior to the search.

On December 15, 1977 petitioner was charged with possession of cocaine pursuant to Kansas Statutes Annotated 65-4127 (a).(Appendix E, hereto infra, page A11)

Said charge was brought by the State of Kansas two days after petitioner was acquitted by a jury of the charge of conspiracy to sell cocaine which was referred to above.

Prior to the trial of the matter petitioner moved to dismiss the State's complaint on the ground that K.S.A. 65-4127 (a) (Appendix E, hereto infra, p.A12.) violated petitioner's right to equal protection, due process, privacy and freedom from cruel and unusual punishment. (State Court Record Vol. I, pp. 21-63))

Petitioner presented affidavits of medical authorities in support of her contention that cocaine was erroneously classified as a narcotic and that the dangers of alcohol and tobacco far outweigh its potential harm to society.

The petitioner also asserted that the Kansas statute (65-4127 (a)) is especially unjust since it classifies simple possession of cocaine, regardless of the amount, as a class C felony and hence lumps together for penalty purposes possession of cocaine, sale of cocaine, sale of

heroin and other dangerous narcotic drugs. Such penalty classification petitioner contended violates the Eighth Amendment's prohibition against cruel and unusual punishment and her right to equal protection of the laws.

The trial court rejected these constitutionally based contentions and the Appellate Courts of Kansas practically ignored them altogether.

When the state charged petitioner with simple possession of cocaine after acquittal of the conspiracy to sell cocaine charge, the state in effect had brought a higher charge after acquittal. (conspiracy to sell cocaine is a Class E. Felony in Kansas)

Petitioner contended upon a motion to dismiss that the state's filing of the possession was an act of harassment. (State Court Record Vol. I, p. 10)

In the Appellate Court of Kansas petitioner contended that the state had violated the

prohibition against prosecutorial vindictiveness since (a) the state had available to it all the evidence needed to bring the charge on June 20, 1977 and (b) it only brought the charge after petitioner had exercised her right to a jury trial on the conspiracy charge and had been found not guilty of that charge. The Kansas Court of Appeals held that the prohibition against vindicativeness was inapplicable on the ground that the facts surrounding the "new and higher charge" (ie the possession charge) were different from the facts which formed the basis of the conspiracy charge. The latter related to an alleged conspiracy to sell cocaine from March to June of 1977; the charge of possession was limited to the alleged possession of the residue on June 10, 1977.

At trial the state was permitted to introduce evidence of the arrest of petitioner on the prior charge by narcotics agents. (State Record T. Vol I, pp4-56)

The jury was not informed of the name of the charge (which was the conspiracy case referred to above) but was made aware of the fact that the arrest warrant was being executed by narcotics division officers. As a result petitioner sought to have admitted evidence of petitioner's acquittal of the conspiracy charge but such was refused by the trial court; the Kansas Court of Appeals found no violation of federal due process. (Appendix B, hereto infra, p.A2)

The principal evidence presented at petitioner's trial was the police laboratory analysis of the residue discovered in the drinking straw referred to above. Hence, the question of the validity of the search was central to petitioner's efforts in the Appellate Courts of Kansas.

The Kansas Court of Appeals held that a woman's purse should be treated like clothing or as items found in the pockets of a person. The court implicitly approved treating a

briefcase as an intended repository of personal effects but refused to accord similar status to a woman's purse. (See Appendix B, hereto infra, p. A2)

The Supreme Court of Kansas gave implicit support to this reasoning of the Kansas intermediate court when it denied review.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to resolve conflicts in principle among lower courts and between the Kansas Appellate Courts and the United States Supreme Court with respect to the applicability of United States v. Chadwick, 433 U.S. 1, 53 L. E.2d 538, 97 SCT. 2476 (1977).

This case involved the question of whether the rationale of United States v. Chadwick, supra applies to the warrantless search of a purse and wallet.

In holding Chadwick inapplicable the

the Kansas Court of Appeals relied on United States v. Robinson, 414 U.S. 218, 38 L.E.2d 427, 94 SCT. 467 (1973) and Dawson v. State, 140 Md App. 640, 395 A.2d 160, 164-167 (1978).

The Kansas court in effect classified a purse as an item of clothing "immediately associated with the person." A wallet taken from a purse is apparently considered in the same category as items taken from the pockets of a coat or trousers. This Court in United States v. Chadwick, supra, specifically distinguished United States v. Robinson, supra, from searches of containers which are intended as repositories of personal effects.

Under the rules laid down by this Court searches of personal possessions do not fall within the Robinson rationale. Search of the person in other words is distinct from searches of personal property. Chadwick "clearly refrained"from extending United States v. Edwards, 415 U. S. 800, 94 Sct.1234, 39 L.E.2d (1977) beyond searches of an arrestee's

clothing", United States v. Schleis, 582 F.2d 1166, 1171, 8th Cir.,(1978).

Petitioner manifested an expectation of privacy as regards the contents of her wallet when she placed same in her purse. Moreover, petitioner's decision to carry her purse demonstrated an intention not to abandon the purse in an unsecured workplace enviornment.

The crucial question is whether petitioner's expectation of privacy is"one, that society is prepared to recognize as 'reasonable', ... whether in the words of the Katz majority the individual's expectation, viewed objectively, is 'justifiable' under the circumstances . . . ." (Smith v. Maryland, 99 S.ct 2577,2580 (1979).

Both the Kansas Appellate Courts and the Maryland Court of Appeals (See, Dawson v. State, supra) applied the principle of United States v. Robinson, supra to the search of

a purse and hence in effect found that there is no legitimate expectation of privacy with respect to the contents of a purse. Such rulings are inconsistent with the underlying rationale of United States v. Chadwick, supra.

Two recent decisions have specifically applied the Chadwick rationale to the search of a purse under circumstances similar to the case at bar. These are People v. Redmond, 390 N. E. 2d 1364 (Appellate Court of Illinois) (1979) and United States v. Farrar, 470 F. Supp. 128 (Mississippi)(1979).

In People v. Redmond, supra, defendant was wearing a purse on his shoulder when confronted by police; he was knocked to the ground during a scuffle. The purse fell to the ground and was searched by one of the police officers. By the time of the search the purse was under control of the police officers and defendant was in custody.

The court, in applying United States v. Chadwick, supra, stated as follows:

> "Whether the item seized be a foot-locker, briefcase, luggage, or a purse it would seem that the owner would possess the same expectation that its contents would remain private and free from public examination." (at page 1374) (Emphasis supplied).

In United States v. Farrar, supra, police officers seized and searched the purse of defendant's wife which was located under the passenger seat of defendant's automobile which was stopped. The search of the purse occurred at the scene of the arrest. The court held that:

> ". . . with the defendant in custody, and the purse in their possession so that the arrestee no longer had access to it, the warrant requirement of Chadwick, supra was triggered. The contents of the purse were clearly not in 'plain view' and by being closed it exhibited the defendant's reasonable expectation of privacy."

The decision relied on by the Kansas Court of Appeals below (ie Dawson v. State,)cites a Ninth Circuit Court of Appeals' case, titled United States v. Moreno, 569 F.2d 1049, (Cal) (1978).

In the latter case the court upheld the search of a purse taken into custody by police at the time of the arrest. However, in United States v. Cornejo, 598 F.2d 555 (Ninth Circuit) (Cal) (1979) the same court held that the search of defendant's purse "may have been illegal under United States v. Chadwick," supra. The court observed that the "lawfulness of the seizure of the purse does not justify the search of its contents; although the purse itself was in plain view, its contents were not . . ." (at page 556) The said court declined to apply Chadwick on the ground that Chadwick could not be applied retroactively.

It is clear that the Kansas Court of Appeals interpretation of United States vs Chadwick, supra, was faulty. The court stressed that petitioner's purse was not secured shut by snap lock, zipper, or other device. Also the

court distinguished a purse from a briefcase and a footlocker without stating the basis for making such distinction. (See, Appendix B, hereto, infra, p. A2) The existence of locks or snaps or zippers or the size of the container is irrelevant under Chadwick .

This court in Arkansas v. Sanders, 6 L.E.2d 235 (1979) in a footnote at page 244 made the following observation:

> " . . . .In the present case, respondent's small unlocked suitcase also had been placed in the trunk of an automobile and was searched without a warrant by police acting upon probable cause. We do not view the difference in the sizes of the footlocker and suitcase as material here; nor did respondent's failure to lock his suitcase alter its fundamental character as a repository for personal, private effects."

A California court has specifically held that the question of whether a container is locked or secured shut by some device is irrelevant to the question of Chadwick's applicability. (People v. Pace, 154 Cal. Rptr. 811 (Court of Appeals, First District, 197).

To hold that a briefcase or luggage constitutes a "repository of personal effects" while denying the same status to a woman's purse is illogical and violates the rule enunciated by this Court in the Chadwick decision.

The decisions of United States v. Moreno, supra, and United States v. Berry, 560 F.2d 861 (7th Cir) (1977) (which distinguishes a briefcase from a purse, and holds in dictum that Chadwick is inapplicable to to a purse) conflict with the opinion in United States v. Farrar, supra on the question of the classification of a purse. United States v. Cornejo, supra seems to have limited the significance of the Moreno decision in the Ninth Circuit but such is not clear.

The Ninth Circuit's refusal to apply Chadwick retroactively in Cornejo directly conflicts with the result reached in United States v. Schleis, supra. In the latter case

this court remanded for reconsideration in light of Chadwick thereby suggesting that Chadwick is to be applied retroactively. The court in Schleis proceeded to apply Chadwick to a pre-Chadwick search of defendant's briefcase. The court cited other federal cases which had previously refused to give Chadwick retroactive application.

The Eighth Circuit Court of Appeals in U. S. v. Schleis, supra, held that the law as stated in Chadwick had always been the law and hence the court did not rely specifically on the ground of retroactive application. This court in United States v. Chadwick, supra observed that ". . .in this area we do not write on a clean slate." (at 433 U. S. 1, 97 Sct. 2482)

Suffice it to say that the law is in a state of uncertainity with respect to the scope of Chadwick's applicability.

The retroactivity issue it should be

noted was raised by the state of Kansas in the Kansas Court of Appeals but was not passed on by that court or by the Kansas Supreme Court.

Society's interest in protecting the right to privacy would be best served by treating purse in the same category as a briefcase, luggage, duffle bag (United States v. Johnson) 588 F2d 147, 5th Cir, 1979), Texas), tote bag (People v. Minjares, 591 P.2d 514, California Supreme Court, 1979) or a shaving kit(U. S. v. Dingell, 1 MJ p. 594,1975) or an attache case and file searched near defendant (United States v. Jackson, 576 F.2d 749, 8th Cir., Mo (1978). Moreover, the same rationale prohibiting the search of a purse would seem to apply to the search of a wallet found within the purse. See the reasoning of of United States v. Marchand, 564 F. 2d 983, (Second Cir)(1977) and State v. O'Neal, 44 P.2d 951, Supreme Court of Oregon,(1965).

Once the purse and wallet were reduced to the exclusive dominion of the police the search of the contents was in violation of the Fourth Amendment. The rule of Chimel v. California, 395 U. S. 752, 23 L.E.2d 685, 89 Sct.,(1969) became inoperative when the police gained exclusive control and custody of the property Absent exigent circumstances the warrant requirement of the Fourth Amendment was triggered. (United States v. Schleis, supra)

II

Certiorari should be granted to determine the constitutionability of cocaine regulation and whether the Kansas Statute as applied to the petitioner violated Federal Constitutional Rights.

The Kansas statute outlawing possession and sale of cocaine (K.S.A. 65-4127 (a), see text in Appendix E, hereto, infra, page A11).

makes no distinction between sale or possession of cocaine nor does it distinguish in any way cocaine from heroin or other dangerous narcotics. Cocaine is classified as an "opiate" in the Kansas Statutes. (See, K.S.A. 65-4107 (b) (4) at Appendix E, hereto, infra, p. A11)

The legislative history of cocaine legislation in the United States demonstrates that there was simply no scientific evidence including data from the social sciences to justify the classification of cocaine as a narcotic or dangerous drug. Moreover, scientific evidence shows that cocaine is (1) non-addictive; (2) is not associated with use of narcotics such as heroin to any significant degree; (3) is less dangerous to human health and to the safety of society than alcohol and tobacco; (4) is not significantly associated with paranoia or other psychoses; and (5) is a mild stimulant not a

depressant; and (6) does not produce death or physical disability.

Support for the above propositions is found in the record below.

Given the false classification of cocaine as a "narcotic" and the relative harm of the drug such statute raises serious Constitutional questions. To what extent has the state exceeded the reasonable scope of its police power? To what extent does such legislation violate the right to equal protection? What rational basis exists for such legislation? To what extent does the right to privacy in this context outweigh governmental interests? These are questions which have not been specifically addressed by this Court to date.

Does classification of cocaine as an narcotic for penalty purposes violate the Eighth Amendment'a prohibition against cruel and unusual punishment?

Not only is there doubt about the constitutionality of the statute itself but when applied to one accused of possessing a barely visible residue in a crumpled plastic straw the unfairness of the statute becomes manifest. The penalty is greater for petitioner that if she was charged with conspiracy to sell cocaine (a class E. felony in Kansas) and indeed is greater than if she was charged with sale of marijuana or involuntary manslaughter or forgery or burglary. The penalty is the same for sale of heroin, robbery, voluntary manslaughter or aggravated battery. The statute (which sets a penalty from one to twenty years) violates the prohibition against cruel and unusual punishment and as applied to defendant violates her right to equal protection of the law. The penalty differentials are arbitrary and lump together a wide variety of offenders both drug and other offenders.

In support of petitioner's contentions we cite the opinion in Commonwealth v. Miller, No. 7734 (Mass. Mun. Ct Roxbury District) (1977).

This court, in analyzing the statute, may consider extrinsic evidence for the process is one of a "judicial inquiry " and not an evidentiary hearing or determination by a trier of fact. (United States v. Carolene Products, 304 U. S. 144, 153, 58 Sct. 778, 82 L.E.D. 1234 (1938), and Chastleton Corporation v. Sinclair, 1264 U. S. 543, 44 Sct. 405, 68 L. Ed 841 (1924).

The Kansas courts erred in finding no constitutional infirmity in the statute or in its application. Review of these questions is merited.

III

Certiorari should be granted to determine the scope of the decision in Blackledge v. Perry 417 U. S. 21, 40 L.E.2d., 628, 94 Sct. 2098 (1974).

The Kansas Court of Appeals asserted below that where the "new and higher charge" brought by the prosecution does not arise out of the acts or transactions that gave rise to the original charge the prohibition against prosecutorial vindicativeness as enunciated by this Court in Blackledge v. Perry, supra is inapplicable. Petitioner asserts that the Kansas court unduly narrowed the scope of Blackledge v. Perry, supra.

The fact that petitioner was charged with possession of cocaine two days after her acquittal on the charge of conspiracy to sell cocaine coupled with the fact that there was no reasonable basis for defering the filing of the charge of possession of cocaine six months later created the appearance of prosecutorial vindicativeness. The straw was discovered in petitioner's purse on June 10, 1977; laboratory analysis occurred on June 20, 1977 suggesting the presence of

of cocaine; the charge of possession was brought on December 15, 1977. By "upping the ante" from conspiracy to selling cocaine to possession of cocaine after petitioner's exercise of her constitutional right to a jury trial the prohibition set forth in Blackledge v. Perry, supra, should have become operative.

Simply because the additional higher charge is not necessarily based on the same or identical facts as those of the first prosecution does not defeat defendant's due process argument based on the Blackledge rule. See United States v. Demarco, 550 F. 2d 1224 (9th Cir) (1977).

The precise question here has not been addressed by this Court. Petitioner believes that review of same has merit.

IV.

Certioreri should be granted to

determine whether under the circumstances of this case petitioner's right to a fair trial was violated by the trial court's exclusion of evidence of petitioner's acquittal on a prior drug charge.

In this case evidence was presented to the jury to show that before the search of petitioner's purse she was arrested on another charge. Though the charge was not mentioned the evidence showed that an arrest warrant was being executed by narcotic officers. The trial court excluded evidence of petitioner's acquittal on the charge giving rise to the arrest.

Where the jury is permitted to infer prior misconduct of an accused the jury should be permitted to consider evidence of the acquittal of the accused in weighing the evidence of the prior misconduct. See State v. Smith, 552 P.2d 9 (Oregon Supreme Court) (1974); People v. Griffin, 58 Cal Rptr 107 (California Supreme Court) (1967),

Womble v. Maryland, .258 A.2d 786 (Court of Appeals of Maryland) (1969)

In State v. Serrano, 498 P.2d 547 (1972) the Court of Appeals of Arizona emphasized the prejudice which is likely where the state introduces evidence which raises an inference that the defendant was under surveillance for suspected misconduct not connected to the instant charge.

Petitioner asserted federal constitutional error in both the Kansas Court of Appeals and the Supreme Court of Kansas.

This issue should be reviewed in conjunction with the other issues raised in this Petition. The Kansas Court of Appeals' reasoning in this case places its decision in isolation from numerous other state court decisions throughout the United States.

CONCLUSION

WHEREFORE petitioner respectfully prays that a writ of certiorari be granted.

Respectfully subnitted

PHILLIPS & PHILLIPS, CHARTERED

By _____

JAMES S. PHILLIPS, SR.

APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF KANSAS

No. 50, 359

State of Kansas, Appellee,

v.

Linda Sabater, Appellant

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date: December 6, 1979

APPENDIX A2

No. 50,359

STATE OF KANSAS, *Appellee*, v. LINDA SABATER, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Search and Seizure—Pocketbook Search Incident to Arrest.* A woman's pocketbook is immediately associated with the person and incident to her arrest a search of the pocketbook is a lawful search. *Cf. United States v. Chadwick*, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977).
2. SAME—*Possession of Cocaine—Conviction Affirmed.* On appeal from a conviction of possession of cocaine, multiple issues are raised and it is held there was no trial error.

Appeal from Sedgwick District Court; GEORGE D. MCCARTHY, associate judge. Opinion filed October 12, 1979. Affirmed.

James S. Phillips, Jr., of Phillips & Phillips, Chartered, of Wichita, for appellant.

Stuart W. Gribble and *Robert J. Sandilos*, assistant district attorneys, *Robert T. Stephan*, attorney general, and *Vern Miller*, district attorney, for appellee.

Before MEYER, P.J., REES and SPENCER, JJ.

REES, J.: Defendant appeals from her conviction of possession of cocaine (K.S.A. 1978 Supp. 65-4127a). We affirm.

On June 10, 1977, defendant was arrested on a warrant charging her and others with conspiracy to sell cocaine (K.S.A. 21-3302; K.S.A. 1978 Supp. 65-4127a). The supporting overt acts all occurred prior to the date of defendant's arrest. Trial resulted in defendant's acquittal. Before us for review is defendant's later conviction arising out of her possession of a plastic drinking straw found in and seized upon search of her pocketbook at the time of her June 10 arrest. The information was filed by the State on December 15, 1977, three days following her conspiracy acquittal.

On appeal, defense counsel has leveled a Gatling gun attack upon the pretrial and trial proceedings. We will endeavor to respond to the dispositive issues raised although in different order and with somewhat different description than ascribed by defense counsel.

An arresting officer testified there appeared to be a whitish residue inside the straw. Laboratory examination by the State resulted in a finding it was cocaine residue. The amount of residue found was of such limited amount that a second "rinse" of the straw resulted in a laboratory sample that failed to show cocaine when examined by prosecution and defense experts.

It now is settled law that possession of any amount of a controlled substance is sufficient to sustain a conviction even though such amount may not be measurable or usable. *State v. Berry*, 223 Kan. 102, 105, 573 P.2d 584 (1977). The credibility of the prosecution's first laboratory examination and its results were thoroughly challenged by the defense at trial; the weight to be given that test result clearly was a question of fact for the jury.

Defendant argues it was error to permit reference by the prosecutor and certain State witnesses to the fact of defendant's June 10 arrest. Defendant further argues that with such references having been made, it was error to not instruct that defendant was acquitted on the charge for which she was arrested.

The references made by the prosecution and its witnesses were not presented or admitted for any purpose for which evidence is rendered admissible by K.S.A. 60-455. There was no reference made to the charge upon which defendant was arrested nor to the factual allegations underlying that charge. The line of case authority upon which defendant relies is distinguishable. It consists of cases in which evidence of the facts of the other crime was admitted. Nothing of that sort took place here. The challenged references were made in explanation of the circumstances surrounding the finding and seizure of the straw. We cannot speculate that the jury might have speculated defendant was earlier involved in like or similar unlawful conduct. Additionally, the record fails to reveal defense counsel's assertion of a specific ground relied upon for exclusion of the references; rather his complaints before the trial court were that the possibly prejudicial effect of such references should have been offset by an instruction that defendant was acquitted of the charge upon which she was arrested.

One of defendant's nonprocedural trial defenses was that there was no knowing possession. The theory was that because the straw was found incident to and under the particular circumstances of defendant's arrest and search, the proper inference to be made was that there was no knowing possession. The testimony regarding the arrest was not only relevant to the State's case, it served as an important factual basis for defendant's "no knowing possession" defense.

Defendant cannot now claim error for failure to give an instruction explanatory of her arrest; her objection was not pre-

served by a request for inclusion in the jury instructions of one informing the jury of her acquittal on the earlier charge. Further, if error is assumed, we find it was harmless and insofar as such assumed error might be considered as federal constitutional error we are well satisfied and declare that beyond a reasonable doubt such error had little if any likelihood of having changed the result of the trial. See *State v. Thompson*, 221 Kan. 176, Syl. ¶ 5, 558 P.2d 93 (1976). We will not reverse on mere conjecture.

When defendant was placed under arrest on June 10, the arresting officer took defendant's pocketbook from her. It was not secured shut by a lock, snap, zipper or other device. The officer searched the pocketbook and among its contents was a wallet in which he found the incriminating straw. Neither the wallet nor the straw were in the plain view of the officer when he obtained control of the pocketbook. The straw was not evidence of the crime for which she was arrested; it was evidence crucial to her present conviction.

Characterizing the pocketbook as a repository of personal effects and relying upon *United States v. Chadwick*, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977), defendant argues the trial court erred in denying her motion to suppress the straw as evidence. She reasons unlawful search of the pocketbook rendered the seizure of the straw unlawful and tainted the State's evidence that the straw contained cocaine residue. We find this contention of unlawful search and seizure to be without merit.

The custodial arrest of defendant was a seizure of her person. The search of her pocketbook and wallet was lawful. *United States v. Robinson*, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973). We do not view defendant's pocketbook to have been a repository of personal property coming within the rule enunciated in *Chadwick* or in such of its progeny as *United States v. Schleis*, 582 F.2d 1166 (8th Cir. 1978). We hold defendant's pocketbook was immediately associated with the person of defendant, the arrestee, and the search of the pocketbook involved no greater reduction in her expectations of privacy than that caused by the arrest itself. Accord, *Dawson v. State*, 40 Md. App. 640, 395 A.2d 160, 164-167 (1978).

Defendant further attacks the evidentiary admissibility of the straw and the result of its examination claiming her June 10 arrest was unlawful because the arrest warrant then executed was not issued upon a proper probable cause showing.

The sufficiency of the probable cause showing for the arrest warrant or warrants issued and executed in the conspiracy case was argued and considered at the trial of that case. Both cases were tried in the Sedgwick County District Court. It was appropriate for the trial judge in this case to take judicial notice of the previous determination of the probable cause issue; furthermore, defendant failed to make the showings required of her under *State v. Jacques*, 225 Kan. 38, 587 P.2d 861 (1978) [attack upon a search warrant], in that she made no allegations, supported by an offer of proof, of specific falsehood or reckless disregard for the truth in the affidavit or other evidence presented for the issuance of the arrest warrant. 225 Kan. at 43-44. The cases relied upon by defendant are distinguishable on their facts.

Defendant asserts her present conviction is the product of prosecutorial vindictiveness proscribed by *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098 (1974). See *Cox v. State*, 2 Kan. App. 2d 121, 575 P.2d 905 (1978). She relies upon *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976), where it was held the mere appearance of vindictiveness brings the *Blackledge* principle into play. 534 F.2d at 1369. This contention is of no benefit to defendant even had it been raised before the trial court. The charge of possession of cocaine (a class C felony) was predicated upon none of the acts specified in the conspiracy to sell cocaine (a class E felony) information. The fact that in the course of the conspiracy trial there was an in camera hearing on the admissibility into evidence of the discovery of the contaminated straw at the time of her arrest does not alter matters; the evidence was not presented to that jury. The present prosecution neither arises out of the acts or transaction that gave rise to the conspiracy prosecution nor is it founded upon evidentiary facts adduced at the prior trial. Defendant's argument is more apt when addressed as a contention of preaccusation delay. However, even this approach fails defendant in the absence of any showing of actual prejudice. *State v. McCorgary*, 224 Kan. 677, 585 P.2d 1024 (1978); *State v. Royal*, 217 Kan. 197, 535 P.2d 413 (1975).

We have extensively considered the other issues raised by defendant. Among these are contentions of erroneous failure to declare a mistrial, the applicability of the doctrines of collateral estoppel and double jeopardy, denial of fair trial, improper re-

fusal or refusals of continuance, statutory constitutional infirmity, erroneous admission and refusal of evidence, failure to disclose exculpatory evidence, erroneous refusal of requested instructions, and insufficiency of the evidence. We find none of defendant's arguments on these issues to have merit. We decline this opportunity to produce a legal tome.

We find no reversible error.

Affirmed.

APPENDIX C

IN THE

COURT OF APPEALS OF THE STATE OF KANSAS

No. 50, 359

State of Kansas, Appellee,

vs.

Linda Sabater, Appellant

You are hereby notified of the following action taken in the above entitled case:

MOTION BY APPELLANT FOR REHEARING

DENIED

Yours very truly,

Lewis C. Carter
Clerk, Court of Appeals

Dated October 25, 1979

APPENDIX D

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff, -vs- LINDA SABATER, Defendant.	Case No. 77CR 2743

JOURNAL ENTRY OF JUDGMENT

On this 5th day of July, 1978, this case comes on regularly for trial. The defendant having heretofore been served a copy of the Information charging her with possession of Marijuana, Count One, contrary to K. S. A. 65-4127 (b) (a) (3); and possession of Cocaine, Count Two, contrary to K. S. A. 65-4127 (a). The State of Kansas appears by its attorney, Kiehl Rathbun, Assistant District Attorney.

The defendant appears in person and by her attorney, James S. Phillips, Jr.

THEREUPON, a Jury is duly impaneled and sworn and evidence is presented; the trial continues from court day to court day, until both sides rest.

Prior to the time the State rested the State made oral motion to the Court to dismiss Count One herein of the information, the charge being possess Marihuana, contrary to K.S.A.4127 (b) (a) (3), which motion was by the Court sustained.

THEREAFTER, on the 13th day of July, 1978, the jury having received the evidence the instructions of the Court, the arguments of counsel and having duly deliberated, returns the following verdict in open court:

> "We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant, Linda Sabater Guilty of possession of Cocain."

Date of this verdict July 13, 1968, /s/ Barbara J. Smith, Foreman.

Thereupon, the Court accepts the verdict and defendant asks for time to file a motion for new trial; the Court sets the motion for hearing on the 2nd day of August, 1978.

Thereafter, on the 2nd day of August, 1978 this case comes on for further hearing on a motion for the defendant for a new trial. All parties appear as aforesaid. The defendant's motion for new trial is heard by the Court, show after hearing arguments of counsel and examining the records, overrules said motion.

Thereupon, the Court inquires of the defendant if she has any legal cause to show why judgment of sentence should not be pronounced against her; the defendant fails to show any such cause and none appears, there being none, the Court proceeds to pronounce judgment of sentence against the defendant as follows:

IT IS THE SENTENCE OF THIS COURT AND IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED

AND DECREED that the defendant is hereby committed to the custody of the Secretary of Corrections for Imprisonment for a period of not less than one (1) nor more than twenty (20) years on the charge of Possession of Cocaine, Count Two, contrary to K.S.A. 65-4127 (a) and in accordance with K.S.A. 21-4501 (c) and K.S.A. 75-5229.

Thereupon, the defendant by and through her attorney makes application for probation from the confinement portion of the sentence which motion was by the Court denied.

Thereupon the Court finds that the defendant is subject to sentence in a federal district court for an offense committed prior to her sentencing in this case and makes the following ourders:

It is further ORDERED that the sheriff of Sedgwick County relinquish custody of the defendant to federal authorities and upon acceptance of custody by such federal

authorities that the sentence imposed herein on the defendant run concurrently with the federal sentence to which the defendant is presently subject, as provided by K.S.A. 21-4608(5). It is further ORDERED that if such federal authorities do not accept custody of the defendant within 30 days after the date sentence was imposed on the defendant herein, the Sheriff of Sedgwick County shall deliver the defendant to the custody of the Secretary of Corrections in execution of the sentence imposed by this Court.

IT IS FURTHER ORDERED that the Superintendant of the Kansas Correctional Institution for Women cause a phychiatric examination and evaluation to be made of the defendant and that a report thereof be made back to this Court, in writing, within 100 days from the date of this Journal Entry of Judgment.

The Court informs the defendant of her right to appeal to the Court of Appeals State of Kansas. Appeal bond set in the amount of $5,000.00.

IT IS SO ORDERED.

_____

GEORGE MCCARTHY, JUDGE

APPROVED:

_____

KIEHL RATHBUN
Assistant District Attorney

_____

JAMES S. PHILLIPS, JR.
Attorney for defendant

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENTS TO THE CONSTITUTION

ARTICLE V:

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put injeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor can be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VIII:

Excessive bail shall not be required, nor

excessive fines imposed; nor cruel and unusual punishment inflected.

ARTICLE IX:

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE XIV:

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

KANSAS STATUTES ANNOTATED

K. S. A. 65-4127 (a) (1973):possession and distribution of opiates, opium or narcotic drugs; penalties. Except as authorized by the uniform controlled substances act,it shall be unlawful for any person to manufacture, possess, have under his control, possess with intent to sell, prescribe, administer, deliver, distribute, dispense or compound any opiates opiem or narcotic drugs. Any person who violates this section shall be guilty of a class C felony, except that, upon conviction of a second offense, such person shall be guilty of a class B felony, and upon conviction for a third or subsequent offense such person shall be quilty of a Class A felony and the punishment shall be life imprisonment.

K.S.A. 65-4107: The controlled substances listed in this section are included in Schedule II . . . .(b) (4);

coca leaves and any salt, compound, deprivative or preparation of coca leaves and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

K.S.A. 21-4501:(c) Class C, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than one (1) year not more than five (5) years and the maximum of which shall be twenty (20) years.

Supreme Court, U. S.
FILED
APR 2 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1349

LINDA K. SABATER,

Petitioner

vs.

STATE OF KANSAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

ROBERT T. STEPHAN
Attorney General of Kansas
Topeka, Kansas

PATRICK L. CONNOLLY
Assistant District Attorney
18th Judicial District of Kansas
535 North Main
Wichita, Kansas 67203

Counsels for Respondent

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I. Certiorari should be denied because the search of petitioner's purse, incident to a lawful arrest, (1) was reasonable and, thus, not violative of the Fourth Amendment of the United States Constitution; (2) the question presented by petitioner does not involve a novel, important, or unresolved federal question; and (3) the federal circuit courts are not in conflict regarding the constitutionality of the type of search which occurred in the instant case.....3

II. Certiorari should be denied because the Kansas Statute, classifying cocaine as a narcotic and prohibiting the possession of such drug, does not violate constitutional rights of due process, equal protection, privacy and freedom from cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.....17

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NATURE OF THE ACTION

The petitioner, Linda K. Sabater, was convicted by a jury on July 13, 1978, in the District Court of Sedgwick County, Kansas, of possession of cocaine, a felony. The Court of Appeals of the State of Kansas affirmed petitioner's conviction in State v. Sabater, 3 Kan. App.2d 692, 601 P.2d 11 (1979), (Appendix A2 of Petition for Writ of Certiorari) and denied petitioner's motion for rehearing on October 25, 1979. On December 6, 1979, the Supreme Court of the State of Kansas denied petitioner's request to review the opinion of the Court of Appeals of Kansas. Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257, § 3; in support thereof, petitioner erroneously contends that the judgment of the Court

of Appeals of Kansas is in conflict with decisions of this Court.

QUESTIONS PRESENTED FOR REVIEW

Whether the search of defendant's purse, incident to a lawful arrest executed with a valid warrant, constituted a violation of petitioner's protection from unreasonable search and seizure under the Fourth Amendment of the United States Constitution.

Whether the Kansas Statute, classifying cocaine as a narcotic and prohibiting the possession of such drug, is violative of petitioner's constitutional rights of due process, equal protection, privacy and freedom from cruel and unusual punishment, under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

Whether the judgment of the Court of Appeals of Kansas, denied review by the Supreme Court of Kansas, finding the search of petitioner's purse proper under the circumstances, is consistent with the decisions of this Court.

ARGUMENTS AND AUTHORITIES

I. CERTIORARI SHOULD BE DENIED BECAUSE THE SEARCH OF PETITIONER'S PURSE, INCIDENT TO A LAWFUL ARREST, (1) WAS REASONABLE AND, THUS, NOT VIOLATIVE OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION; (2) THE QUESTION PRESENTED BY PETITIONER DOES NOT INVOLVE A NOVEL, IMPORTANT, OR UNRESOLVED FEDERAL QUESTION; AND (3) THE FEDERAL CIRCUIT COURTS ARE NOT IN CONFLICT REGARDING THE CONSTITUTIONALITY OF THE TYPE OF SEARCH WHICH OCCURRED IN THE INSTANT CASE.

Petitioner contends that the search of her purse, was conducted in the absence of exigent circumstances, subsequent to the time she was placed in custody; and after the police had reduced her purse and wallet to their exclusive possession. Under these circumstances, she maintains that the search was unreasonable and violative of the Fourth Amendment of the United States Constitution, citing to State v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979) as controlling.

Both Chadwick and Sanders are distinguishable from the instant case. It is not disputed that petitioner's arrest was lawful. What is questioned is the legality of the search of petitioner's purse.

Law enforcement officials arrested the petitioner in the lobby of her

employer's premises. The petitioner was allowed to return to her desk, accompanied by her supervisor, to retrieve personal belongings. Upon her return, an arresting officer took petitioner's pocketbook. The purse was not secured by any snaps, locks, zippers or other devices. Among the contents of her purse was a wallet in which the arresting officer found a straw, later determined to contain cocaine (State Record).

At trial, petitioner's motion to suppress the incriminating straw was denied.

Contrary to petitioner's position, the search in this instance was lawful. In Arkansas v. Sanders, supra, this Court said:

> Although the general principles applicable to claims of Fourth Amendment violations are well settled, litigation over a request for suppression of highly relevant

> evidence continues to occupy much of the attention of Courts at all levels of the State and Federal Judiciary. Courts and law enforcement officials often find it difficult to discern the proper application of these principles to individual cases, because the circumstances giving rise to suppression requests can vary almost infinitely. Moreover, an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment Rights. At _____.

In Sanders, the Court noted that interpretation of the Fourth Amendment has included "the requirement that normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause". [Citations omitted]. In the ordinary case, therefore, a search of private property must be both reasonable and performed pursuant to a properly issued search warrant. At_____. Also in Sanders, this Court, noting there are

exceptions to the warrant requirement; offered this insightful comment:

> These have been established where it was concluded that the public interest requires some flexibility in the application of the general rule that a valid warrant is a pre-requisite for a search. At_____.

A particularly instructive case in distinguishing Chadwick and Sanders from the instant case is United States v. Garcia, 605 F.2d 349, 352 (7th Cir. 1979). In Garcia, the Court after acknowledging the fundamental right guaranteed by the Fourth Amendment to be secure against unwarranted invasions by the State, noted:

> [It] is well - settled that a warrantless search conducted incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. At _____ .

Citing to United States v. Robinson, 414 U.S. 218 (1973). Further, "[s]uch

searches have been held to be reasonable within the same meaning of the Fourth Amendment when effected for the purpose of disarming the arrestee or to preserve evidence probative of criminal conduct". At 352-3. Garcia further stated that warrantless searches pursuant to a valid arrest, if substantially contemporaneous with the arrest and confined to the person and the immediate vicinity of the arrestee, have been held to be lawful.

In Chimel v. California, 395 U.S. 752 (1969) this Court addressed the scope of such searches:

> [I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction .... There is ample justification, therefore, for a search of the arrestee's person in the area "within his immediate control" -- construing that phrase to mean the area from which he might gain pos-

session of a weapon or destructible evidence.

In the instant case, the search was conducted within a few minutes following petitioner's arrest and immediately after she returned from fetching her purse. Therefore, the search was substantially contemporaneous with the arrest. The search was also spatially limited to the person of the arrestee, and to a possession immediately associated with petitioner's person.

The Court in Garcia, also noted that in Chadwick:

> [T]he object seized was a cumbersome, 200 pound double-locked footlocker, which obviously could be neither quickly opened nor rapidly removed by the defendant or an accomplice at the time of arrest. It is also significant that the search itself was not undertaken in close proximity to the time and place of the arrest and seizure. Rather, the footlocker was opened more than one hour following the arrest, and then only after it had been removed along with the defen-

> dants to the police station... Under these circumstances, ample justification existed to delay the search until a warrant could be obtained. At 353.

The facts of the present case are very similar to those in Garcia. Here, the object searched was a hand-carried purse. In Garcia, the object of search was hand-carried luggage. In both situations, the defendant could easily gain access to a weapon or evidence. Neither search was remote in time or place from the arrest.

Addressing petitioner's second point regarding the reduction of the items searched to the exclusive control of law enforcement officers, a return to Garcia is appropriate. In Garcia the defendant had maintained that luggage seized, and reduced to the exclusive control of the police, could not lawfully be searched because there were no exigent circum-

stances at the time of the search. The Chadwick rationale, referred to above, in Garcia is not applicable here. As the Garcia Court points out.

> [To] construe the term "exclusive control" as meaning it attaches immediately upon the seizure of an object located on the person or within the immediate vicinity of the arrestee, is a construction incapable of application consistent with fundamental principles of constitutional law. Under such a construction, for example, the warrantless search of an arrestee resulting in the seizure of a wallet, purse, or shoulder bag would prohibit an immediate search of the contents of that type of container, and this is plainly contrary to the law governing searches incident to arrest. Rather, the concept of "exclusive control" must be construed in the context of its application in Chadwick where the Supreme Court stated:
>
> Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore, cannot be viewed as incidental to the arrest or as justified by any other exigency. 433 U.S. at 15. [Emphasis added].

In the instant case, where the purse searched occurred within minutes of petitioner's arrest and in the immediate presence of the arrestee, there is a distinct difference. Chadwick is simply not applicable.

Petitioner cites Sanders as controlling because this Court there found that law enforcement officers, who had seized luggage and had it exclusively within their control at the time of the search, should have obtained a search warrant. Sanders, however, is distinguishable because it involved a closed suitcase in the trunk of an automobile. This Court, under the circumstances of Sanders, was cognizant that there was no danger the contents of the piece of luggage could have been removed, prior to the issuance of a valid search warrant.

Should there still be some question

as to the validity of the purse search, the State invites this Court's attention to the Seventh Circuit Court of Appeals language in United States v. Berry, 560 F.2d 861 (7th Cir. 1977). In Berry, the Court held that an attache case did not fall within the category of personal property immediately associated with the person of the arrestee. Further the Court made a comparison:... "a purse... might be characterized as 'immediately associated with the person of the arrestee' because it is carried with the person at all times, the attache case was here more like luggage..." At 864.

Following a discussion of Chadwick, the Court in Berry further amplified the distinction between items immediately associated with the arrestee and items within the immediate control of the arrestee:

> The Court appears to be distinguishing - for purposes of whether a warrant is required to search property in police custody that was seized from a suspect at the time of arrest - between searches of an arrestee's clothing as in Edwards or items that were in the pockets, as in Robinson from searches of other possessions, such as luggage, that were within his immediate control. Warrantless searches of the former items after they come in police custody can be characterized as searches of the arrestee's person, because they do not involve any greater reduction in the arrestee's expectations of privacy than that caused by the arrest itself. Warrantless searches of the latter items, however, affect privacy interests other than those reduced by the arrest itself and thus can be conducted only so long as the danger exists that the arrestee might gain access to the property to seize a weapon or destroy evidence.

In the instant case a purse clearly falls within the category of personal property immediately associated with the person of an arrestee. Therefore, it is subject to a search incident to a lawful

arrest without the requirement of a warrant. A purse is almost universal in use as a necessary part of a woman's wardrobe, the type of personal property commonly carried with the owner. This item is generally not locked and not associated with items such as briefcases, attache cases, or luggage. No greater reduction in the expectation of privacy occurs by the search of a purse than there would be in a search of a man's billfold, carried in his pocket at the time of arrest.

Petitioner seeks to make a purse analagous to luggage in that a purse is also a "repository of personal possessions". This similarity of use is only one factor mentioned in Sanders. The foregoing discussion has adequately demonstrated the reasons Sanders is not controlling here.

Should this Court find that the search in this case does violate the rule enunciated in Chadwick, Chadwick is nevertheless inapplicable to the instant case. The search of petitioner's purse occurred on June 10, 1977, and this Court decided Chadwick on June 21, 1977. Chadwick is not to be applied retroactively. United States v. Stewart, 591 F.2d 63 (9th Cir. 1979); United States v. Cornejo, 598 F.2d 554 (9th Cir. 1979); United States v. Berry, 571 F.2d 2 (7th Cir. 1978), cert. denied, 439 U.S. 848 (1978).

From the foregoing discussion, it is clear that petitioner's request for a Writ of Certorari is not one based on a novel situation or a circumstance not formerly addressed by this Court.

Further, a diligent search has failed to uncover any conflict between

the Circuit Court of Appeals in rulings governing circumstances similar or substantially similar to those of the instant case.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE KANSAS STATUTE, CLASSIFYING COCAINE AS A NARCOTIC AND PROHIBITING THE POSSESSION OF SUCH DRUG, DOES NOT VIOLATE CONSTITUTIONAL RIGHTS OF DUE PROCESS, EQUAL PROTECTION, PRIVACY AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioner contends that K.S.A. 65-4127(a) (Appendix A12 of Petition for Writ of Certorari) violates the due process and equal protection rights guaranteed to her by the United States Constitution. She asserts that cocaine

is improperly classified as a narcotic drug and that the Kansas Statute prohibiting possession of cocaine is unconstitutional. She also asserts there is no scientific evidence to justify such classification.

Respondent invites this Court's attention to language contained in United States v. Hobbs, 392 F. Supp. 444 (1975):

> In classifying cocaine as a narcotic drug, 21 U.S.C. § 802(16), Congress was not required to accept the pharmacological definition of a narcotic. Thus, the numerous affidavits submitted by defendant's experts are of limited relevance since they tend to establish only that cocaine is not a narcotic in pharmacological classifications. The sole question presented is whether there is some rational basis for the statutory classification of cocaine as a narcotic. In United States v. Brookins, the Court pointed out that there was some evidence that Congress was aware of the discrepancy between the legal and pharmacological classifications of cocaine at the time of hearings immediately preceeding the

1970 Act, but retained the "narcotic" classification of cocaine for control and penalty purposes because of "its established capacity as a dangerous drug, (and) its long association with heroin in the illicit market.

383 F. Supp. at 1216.

There are any number of rational bases which can be assumed under the Carolene test in upholding the congressional classification of cocaine as a narcotic for penalty purposes. Congress may have concluded that since the price of cocaine on the illicit drug market is extremely high, it is more likely to attract major drug traffickers or provide a source of revenue for organized crime. Congress may have concluded that a high-profit enterprise must also be treated as a high-risk enterprise in order to effectively deter criminal activity in this market. Congress may have retained the "narcotics" classification because of the paucity of scientific data concerning the use and effect of cocaine, or because it is used by drug abusers either alone or in combination with heroin, or in furtherance of treaty obligations. See 21 U.S.C. § 801(7). These considerations, either singly or in combination, provide an ample foundation for finding that the congressional classification of cocaine as a narcotic has a rational basis....

To the extent that the defendants have argued for reclassification of cocaine on the basis of newly discovered scientific evidence, their argument has been presented to the wrong branch of Government. Congress has the power to reclassify cocaine. Congress has delegated that power to the Attorney General, 21 U.S.C. § 811(a)(1). The existence of an established reclassification mechanism underscores the impropriety of this Court taking such action. See United States v. Foss, 501 F.2d 522, 530 (1st Cir. 1974).

Since there is a rational basis for the classification of cocaine as a narcotic for control and penalty purposes, the Court holds that this classification does not violate the defendant's Fifth Amendment rights. Accordingly, the motion to dismiss is hereby denied.

Federal Courts have consistently determined that a rational basis exists for classification of cocaine as a narcotic drug for penalty purposes. See United States v. Harper, 530 F.2d 828 (9th. Cir. 1976) cert. denied 429 U.S. 80, 97 S. Ct. 66; United States v.

Lindelow, 435 F. Supp. 367 (District of Puerto Rico 1977); United States v. Smaldone, 484 F. 2d 311 (10th Cir. 1973) cert. denied 415 U.S. 915.

Petitioner also alleges that the classification of cocaine as a narcotic for penalty purposes violates the Eighth Amendment prohibition against cruel and unusual punishment. Petitioner notes that the penalty for possession is greater than if she were convicted of sale of marijuana.

In United States v. Castro, 401 F. Supp. 120 (Northern District of Illinois 1975), the Court considered the related situation of classification of marijuana (also the subject of scientific evidence supporting unreasonable classification arguments), in the federal schedule I along with heroin; the Court stated at 127:

> Nor do we find that the disparity in penalties offends the Eighth Amendment as the statute "does not exist an inclination to visit upon the offenders penalty so out of proportion to the crime committed that it shocks a balanced sense of justice". In citing Helperin v. United States, 295 F.2d 458 (9th Court of Appeals 1961).

CONCLUSION

It is respectfully submitted that inasmuch as the decision of the Court of Appeals of Kansas affirming petitioner's conviction has been shown to be consistent with decisions of this honorable Court and the Federal Circuit Courts of Appeal, the petitioner should be denied a Writ of Certiorari.

ROBERT T. STEPHAN
Attorney General
Topeka, Kansas

VERN MILLER
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IN THE SUPREME COURT FOR THE UNITED STATES

LINDA K. SABATER, Petitioner, vs. STATE OF KANSAS, Respondent.	Case No. 79-1349 CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief in Opposition was mailed, first class postage prepaid, to James S. Phillips, Sr., 3241 East Douglas, Wichita, Kansas 67218, and a copy was hand carried to Tom Haney, Assistant Attorney General, Office of the Attorney General, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612, on the 31st day of March, 1978.

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